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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON CHRISTOPHER CHINCILLA,

Defendant and Appellant.

G057448

(Super. Ct. No. 08CF3485)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Byron Christopher Chinchilla appeals from the trial court's order denying his Penal Code¹ section 1170.95 petition. Chinchilla argues section 1170.95 provides relief for those convicted of attempted murder and he is entitled to a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). Neither contention has merit, and we affirm the order.

FACTS

The facts of the offenses can be found in *People v. Chinchilla et al.* (Dec. 27, 2012, G045111) [nonpub. opn.] (*Chinchilla I*). As relevant here, forensic evidence demonstrated 19-year-old Chinchilla was not the shooter; his codefendant was the shooter. (*Ibid.*) The trial court instructed the jury on the natural and probable consequence theory. (*Ibid.*)

The jury convicted Chinchilla of four counts of willful premeditated and deliberate *attempted* murder, and numerous other offenses, including street terrorism, and found true criminal street gang and vicarious firearm enhancements. (*Chinchilla I, supra*, G045111.) The trial court sentenced Chinchilla to prison for four consecutive life terms with the possibility of parole plus 80 years. (*Ibid.*) In *Chinchilla I, supra*, G045111, we affirmed in part, reversed in part, and remanded for resentencing.

The trial court resentenced Chinchilla, vacating enhancement sentences and vacating, imposing, and staying a sentence on the street terrorism conviction. (*People v. Chinchilla* (Nov. 7, 2013, G048245) [nonpub. opn.] (*Chinchilla II*).) We affirmed the judgment in *Chinchilla II, supra*, G045111.

Over five years later, Chinchilla filed a petition seeking to vacate his attempted murder convictions pursuant to section 1170.95. The trial court denied the petition, ruling the following: “The petition does not set forth a prima facie case for

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All further statutory references are to the Penal Code.

relief under the statute. A review of court records indicates defendant is not eligible for relief under the statute because the defendant does not stand convicted of murder or defendant's murder conviction(s) is not based on felony-murder or on a natural and probable consequences theory of vicarious liability for aiders and abettors."

DISCUSSION

I. Section 1170.95

Chinchilla argues the trial court erred by denying his section 1170.95 petition because it should apply to attempted murder. We disagree.

Section 1170.95, subdivision (a), provides, in relevant part, "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" The new statute, enacted as part of Senate Bill No. 1437 (S.B. 1437), modified the law relating to accomplice liability for murder but does not mention the crime of attempted murder. Chinchilla concedes section 1170.95 does not mention attempted murder.

Arguments have been made the statute should be expanded beyond its wording to include attempted murder, but we are not persuaded. Our colleagues in the Second District recently addressed this issue in *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), review granted November 13, 2019, S258175 (Cal. Rules of Court, rule 8.1115(e)(1) [while review pending may rely on for persuasive value]). The *Lopez* court concluded S.B. 1437 excluded any relief for individuals convicted of attempted murder. (*Lopez, supra*, 38 Cal.App.5th at p. 1104.) It noted S.B. 1437's plain language and legislative history supported this conclusion. (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) In citing S.B. 1437's repeated use of the term "murder" and the absence of the use of the term "attempted murder," the court concluded the Legislature's intention to limit relief to those convicted of the completed crime of murder was clear. (*Lopez, supra*,

38 Cal.App.5th at p. 1105.) We find the *Lopez* court’s reasoning persuasive and conclude the petitioning procedures in section 1170.95 do not apply to attempted murder, the crime of which Chinchilla stands convicted. Chinchilla’s other arguments do not justify a departure from the plain meaning of S.B. 1437.

II. Franklin Hearing

Chinchilla contends we should remand the matter for a *Franklin* hearing. Not so.

“A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense.” (§ 3051, subd. (a)(1).) “[T]he board, in reviewing a prisoner’s suitability for parole . . . shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§ 4801, subd. (c).)

In *Franklin*, *supra*, 63 Cal.4th at page 268, defendant was 16 years old when he committed murder and the trial court was statutorily required to sentence him to two consecutive sentences of 25 years to life. The court sentenced defendant before the Legislature enacted Senate Bill No. 260 (S.B. 260), which became effective January 1, 2014, and added section 3051 and section 4801, subdivision (c). (*Id.* at pp. 268, 276.) The *Franklin* court determined it was not clear if defendant had sufficient opportunity at sentencing to “make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense” to enable the Board to “properly discharge its obligation to ‘give great weight to’ youth-related factors.” (*Id.* at p. 284.) The court remanded the case to the trial court for a determination whether defendant had an opportunity to make this record. (*Ibid.*)

Here, Chinchilla was 19 years old at the time of the offenses. The trial court sentenced him to prison before the Legislature enacted S.B. 260. We decline Chinchilla's request to remand the matter to the trial court for the limited purpose of conducting a *Franklin* hearing. As the Attorney General notes, Chinchilla did not request a *Franklin* hearing in his petition, and the issue was not before the trial court. His notice of appeal stated he was appealing from the denial of his section 1170.95 motion. Thus, the issue is not before us. "[T]he scope of review on appeal is limited to the proceedings which led to the judgment under review." (*People v. Wade* (1968) 266 Cal.App.2d 918, 929.)

In his reply brief, relying on *In re Cook* (2019) 7 Cal.5th 439 (*Cook*), Chinchilla states we "should treat the argument as one under . . . section 1203.01 and simply remand the case with directions for a hearing on that motion." In *Cook, supra*, 7 Cal.5th at page 458, the court stated: "For inmates like [defendant] who seek to preserve evidence following a final judgment, the proper avenue is to file a motion in superior court under the original caption and case number, citing the authority of section 1203.01 and today's decision. The motion should establish the inmate's entitlement to a youth offender parole hearing and indicate when such hearing is anticipated to take place, or if one or more hearings have already occurred."

We also decline Chinchilla's request to treat his section 1170.95 motion as a request for a *Franklin* hearing pursuant to section 1203.01. Our decision does not foreclose Chinchilla from filing a motion for a *Franklin* hearing pursuant to section 1203.01 and *Cook*.

DISPOSITION

The order is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.